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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 831

RICHARD L. GRAY, *Petitioner*

v.

GULF, MOBILE & OHIO RAILROAD COMPANY, a corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Respondents

BRIEF FOR RESPONDENT UNION IN OPPOSITION

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the District Court (App. 22a)[1] is reported at 302 F.Supp. 392 (1969). The opinion (App. 1a) and judgment (App. 20a) of the Court of Appeals for the Fifth Circuit is reported at 429 F. 2d. 1064 (1970).

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[1] References are to the Appendix to the Petition unless otherwise stated.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

RESTATEMENT OF QUESTION PRESENTED

Are the statutory or constitutional rights of a railroad employee violated by a requirement that he pay uniformly required union dues and fees, without the necessity of becoming a member of the union, pursuant to the provisions of the Railway Labor Act and a union shop agreement executed thereunder in circumstances where the employee asserts as a matter of individual belief that compliance conflicts with his religious convictions?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions which Petitioner seeks to invoke are set forth in the Petition at p. 3. The provisions of Section 2 Eleventh (a) of the Railway Labor Act, 45 U.S.C. § 152 Eleventh (a), involved, are set forth in the Petition at pp. 3-4.

RESTATEMENT OF THE CASE

Both the District Court and Court of Appeals found and Petitioner concedes that there is no genuine issue of any material fact in dispute in the case (App. 2a, 22a, and Pet. 4). Because the Petition does not adequately relate all relevant facts of record and because Respondent Union is of the opinion that the Petition sets forth argument as alleged facts (Pet. 7-10), Respondent Union refers the Court to the findings of fact of the District Court (App. 22a-26a) accepted by the Court of Appeals as an accurate statement of the facts (App. 2a, fn. 1).

For example, the Petition (p. 10) erroneously states that "it stands as established and uncontradicted that plaintiff's religious faith is in direct conflict with the requirement of defendants that he pay dues and fees to the Union." The effort made by Petitioner to equate his individual beliefs with the dogma of the Seventh-Day Adventist faith does not square with findings of fact of either the District Court (App. 30a) or the Court of Appeals (App. 7a).[2] The Petitioner recognizes as much when he argues (Pet. 9) that the District Court erred in stating (App. 30a) that the Seventh-Day Adventist Church "does not advocate that its members refrain from joining or supporting labor unions." It is Respondent Union's position that even if the dogma of the Seventh-Day Adventist Church did contain prohibitions against its members joining labor unions, the statutory requirement that an employee pay uniformly required union dues and fees would not violate any statutory or constitutional right. However, the facts and the findings of the Courts below make clear that such a church tenet is not here involved. *Cf. Sherbert* v. *Verner*, 374 U.S. 398.

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[2] Included in the record is a letter signed by the Associate Director of the Department of Religious Liberty of the Seventh-Day Adventist Church addressed to an officer of Respondent Union on May 16, 1967, setting forth the position of the Church with reference to its relationship to labor unions. This letter stated that Seventh-Day Adventists are in sympathy with the basic objectives of organized labor—proper wages, proper hours, and proper working conditions—and further stated that "They believe that those laborers who are conscientiously free to do so are warranted in organizing to obtain such objectives." It further stated that "It is on the basis of these principles that *they accord to every man the right to join or not to join, a labor union.* They believe, however, that no opposition should be raised against, and no penalties or disabilities applied to, those who choose not to belong to labor unions for reasons of conscience." (App. 5a-6a.) (Emphasis supplied.)

In addition, the findings of the Courts below show, among other things, that for a period of many years prior to 1967 Petitioner was a member of Respondent Union while continuing as an active member of his Church and that it was not until his return to work from a leave of absence that he refused to rejoin the Union or accept the alternative of simply paying uniformly required fees and dues without joining. (App. 24a, 25a.)

ARGUMENT

The statutory and constitutional issue presented in this case is a narrow one which in the opinion of the Courts below has already been determined by this Court. No court and no judge of any District Court or Court of Appeals has accepted Petitioner's basic contention that statutory or constitutional rights are infringed if the union shop requirements of the Railway Labor Act are applied to a railroad employee who maintains that the payment of dues and fees uniformly required as a condition of employment are in conflict with his individual religious convictions. On the other hand, contentions substantially similar to those here involved have been rejected by Courts of Appeals for the Second and Ninth Circuits and petitions to review these decisions were denied by this Court. *Otten* v. *Staten Island Rapid Transit Ry. Co.*, 229 F.2d. 919 (2d Cir., 1956) *cert. den.* 351 U.S. 983; *Wicks* v. *Southern Pacific Co., et al.*, 231 F.2d 130 (9th Cir., 1956) *cert. den. Wicks* v. *Brotherhood of Maintenance of Way Employes*, 351 U.S. 946.

Thus, there is no conflict of decisions and none is asserted by Petitioner. Moreover, in the light of this Court's decisions in *Railway Employes' Dept., AFL,*

et al. v. *Hanson*, 351 U.S. 225 and *International Association of Machinists* v. *Street*, 367 U.S. 740 upon which the decision below was predicated, there is no important question of Federal law presented which requires decision by this Court. Under such circumstances, the case clearly is not one warranting review by this Court on certiorari.

The argument presented by Petitioner is a two-pronged approach that either the statute has been misinterpreted and misapplied or that it is unconstitutional. The District Court was of the opinion that Petitioner was not seriously pressing his claim of unconstitutionality because that issue had already been determined by the Supreme Court but was confining his argument to the statutory construction issue (App. 24a). In any event, there was no application by Petitioner for the establishment of a three-judge court under 28 U.S.C. §§ 2282-2284 which is the required procedure when injunctive relief is sought on the basis of asserted unconstitutionality of an Act of Congress. *Coffman* v. *Breeze Corps., Inc.*, 323 U.S. 316, 317 fn. 1.

On the other hand, the Court of Appeals thought so little of Petitioner's statutory construction contention as to summarily reject it as "totally devoid of merit" and confined its review to Petitioner's constitutional argument (App. 9a). In doing so and rejecting that argument, however, the Court of Appeals makes clear that it regarded the contention as narrowed on appeal to the First Amendment (App. 8a, fn. 8), a position which the Court regarded as untenable under this Court's decisions in *Hanson and Street, supra* (App. 9a). The disposition of the constitutional issue by the Court of Appeals is justified on the ground that it

correctly regarded Petitioner's contention as failing to present a substantial constitutional question and one obviously without merit. Otherwise, the issue would have had to be first determined by a statutory court of three judges. *Ex parte Poresky*, 290 U.S. 30; *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Flast* v. *Cohen*, 392 U.S. 83, at p. 90, fn. 3.

We now turn to a discussion of the two contentions presented by Petitioner to this Court in justification of certiorari, both of which were rejected below in a decision which we submit was clearly correct.

I

The Court of Appeals Correctly Held That a Requirement That Petitioners Pay Uniformly Required Union Dues and Fees as a Condition of Continued Employment Under an Applicable Union Shop Agreement Does Not Violate Any of Petitioner's Statutory or Constitutional Rights

Petitioner first argues that Section 2 Eleventh of the Railway Labor Act should be construed as not requiring a railroad employee to pay uniformly required dues and fees as a condition of continued employment if he objects to such payment on religious grounds. In the alternative, Petitioner contends that if the statute is not so construed it is unconstitutional.

The applicable provisions of Section 2 Eleventh which authorize union shop agreements in the railroad industry are quoted at pp. 3-4 of the Petition. These provisions contain no limitation or exception for railroad employees who object to the payment of uniformly required dues or fees on religious grounds and there are no indications in the legislative history of the provi-

sions that Congress had any such intention. The only condition contained in the statute is that no railroad employee shall lose his job for lack of union membership for any reason other than his failure to tender periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

In support of his argument Petitioner concedes that the exception he seeks does not appear on the face of the statute (Pet. 13) but argues that this Court's decisions in *Railway Employes' Dept., AFL* v. *Hanson*, 351 U.S. 225 and *International Association of Machinists* v. *Street*, 367 U.S. 740; *Brotherhood of Railway Clerks* v. *Allen*, 373 U.S. 113; and *Welsh* v. *United States*, ... U.S. ..., 26 L.Ed. 2d 308, indicate that the Court will construe the statute in such a way as to protect First Amendment rights under the Constitution. He then goes on to state that it follows that the statute should be construed as not authorizing the payment of union dues and fees from those whose religious beliefs conflict with such payment (Pet., 11-14).

The Court of Appeals rejected this argument as "totally devoid of merit" (App. 9a). That Court's analysis of the *Hanson* and *Street* decisions read in conjunction with its discussion of Petitioner's constitutional argument demonstrates that whether the problem is approached as one of statutory construction or of constitutional interpretation, Petitioner's contentions are lacking in substance.

The attack there on the constitutionality of Section 2 Eleventh in the *Hanson* case included claims that the statute and agreements executed under it violated pro-

tections of the First and Fifth Amendments to the Federal Constitution. In rejecting these claims this Court first found that the purpose of Section 2 Eleventh is the financing of the cost of collective bargaining in industries subject to the Railway Labor Act and that Congress had determined such purposes to be in the public interest. This Court then determined that such purpose was a valid one which did not infringe on rights under the First and Fifth Amendments and, with particular application to the issue here, it expressly emphasized that it was only holding "that *the requirements for financial support* of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendment." 351 U.S. 225, 236-238. (Emphasis supplied.)

What this Court expressly reserved for future assessment in *Hanson* were two issues only, neither of which is presented by Petitioner. First, it stated that if conditions other than a uniform requirement of dues, initiation fees or assessments were imposed in a particular case as a condition of employment, its judgment in the *Hanson* case would not prejudice a decision in such a case. Second, it stated that if the exaction of dues, initiation fees or assessments is used as a cover for forcing ideological conformity in contravention of the First Amendment, the *Hanson* decision would not foreclose that issue. It is undisputed here that no conditions other than the payment of dues and fees uniformly required of all employees have been imposed upon Petitioner and it is likewise established by the undisputed facts that this requirement of financial support is not being used as a cover for forcing

ideological conformity in any manner. Petitioner has not been asked to subscribe to any union tenets or doctrines nor, in fact, has he been required to join the union. He has only been required to contribute on a uniform basis with all other employees to the cost of representation.

Five years later in the *Street* case this Court had before it a claim by railroad employees that a substantial part of the dues and fees they were required to pay under a union shop agreement was being used to finance the campaigns of candidates for federal and state office whom they opposed and to promote the propagation of economic doctrines, concepts and ideologies with which they disagreed. Their claim of unconstitutionality for deprivation of rights under the First and Fifth Amendments was upheld by the Georgia courts. This Court held that the problem was not of constitutional dimensions, but rather involved expenditures of dues and fees for purposes not sanctioned by the statute. It remanded the case for determination of the proper remedy to preclude the invalid expenditure but, in doing so, it specifically reaffirmed the constitutional validity of compulsory payment of union dues and fees—the only issue involved in the instant Petition. On this point the Court observed, 367 U.S. 740 at 771:

> "[T]he union-shop itself is not unlawful [citing *Hanson*]. The appellees therefore remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement. Their right of action stems not from constitutional limitations on Congress' power to authorize the union shop, but from § 2, Eleventh itself. In other words, appellees' grievance stems from the spending of their funds for purposes not

> authorized by the Act in the face of their objection, *not from the enforcement of the union-shop agreement by the mere collection of funds.* If their money were used for purposes contemplated by § 2, Eleventh, the appellees would have no grievance at all." (Emphasis supplied.)

Thus, the *Street* decision and the subsequent decision of this Court in *Brotherhood of Railway and Steamship Clerks* v. *Allen,* 373 U.S. 113 provide only that an employee who objects to union funds being used for purposes other than collective bargaining must make his objection known to the union and obtain a proportionate reduction. But these decisions do not stand for the proposition that an employee can, as Petitioner seeks to do in the present case, refuse to pay any dues or fees on the ground that to do so is objectionable to his religious principles.

Insofar as Petitioner relies upon this Court's decision in *Welsh* v. *United States,* ... U.S. ..., 26 L.Ed 2d 308, we fail to see how that decision is relevant to the issue here involved. What the Court there held was that exemptions from military services contained in Section 6(j) of the Universal Military Service and Training Act, properly interpreted, were not confined to purely religious beliefs in the traditional or theistic sense but extended as well to moral or ethical beliefs held with the same degree of conviction. What the case did not decide or involve, apposite to the issues here, was whether Congress could consistently with the First Amendment, eliminate all exemptions for conscientious objectors on religious grounds or otherwise.

II

There Is No Conflict of Decisions

There are no other decisions, trial or appellate, which conflict with the decision below here sought to be reviewed and consequently none are asserted by Petitioner. On the other hand, as indicated by the District Court in the instant case, complaints similar to Petitioner's have been rejected by other Courts of Appeals and petitions to review these decisions denied by this Court (App. 30a).

The list of previous cases involving complaints similar to that of Petitioner include the following: *Otten* v. *Baltimore & Ohio Railroad Co.*, 205 F.2d 58 (2d Cir., 1953); *Otten* v. *Staten Island Rapid Transit Co.*, 229 F.2d 919 (2d Cir., 1956) *cert. den.* 351 U.S. 983; *Wicks* v. *Southern Pacific Co., et al.*, 231 F.2d 130 (9th Cir., 1956) *cert. den., Wicks* v. *Brotherhood of Maintenance of Way Employes*, 351 U.S. 946. Petitioner gives these cases scant attention in a footnote and dismisses them as not involving any "constitutional problem or issue" (Pet., p. 12, fn. 1).

This summary treatment of such decisions is in error. Petitioner's contention is that the *Otten* and *Wicks* cases involved only the question of whether or not a union shop agreement is private action in which no governmental involvement is present in a constitutional sense. It is recognized that since this Court's decision in *Hanson*, governmental action is involved in union shop agreements. However, it is simply not accurate to describe the *Otten* and *Wicks* decisions as being limited to a consideration of this issue. The decision of the Second Circuit in the *Otten* case considered and ruled upon two questions; i.e., (1) whether the action should be tried by a court of three judges, and (2)

whether the District Court had erred in its holding on the merits of the First Amendment issue presented. The Second Circuit in an opinion written by Judge Learned Hand held that no substantial constitutional issue requiring a three-judge court was presented. That Court also made the following findings with respect to the merits (205 F.2d 58, at p. 61):

> "The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *iniquitous dens*, no matter what economic loss his change of domicile entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world." (Emphasis the Court's.)

In the *Wicks* case both the District Court and Court of Appeals also considered the case on the merits and rejected plaintiff's contention that his religious rights under the First Amendment and other constitutional rights had been infringed. 121 F.Supp. 454 at 457 (S.D. Calif., 1954); 231 F.2d 130, 135, 138 (9th Cir., 1956).

The remaining cases cited and discussed in the Petition (pp. 17-25) have no bearing upon the issues presented for review in this case in that they deal with unrelated problems with an entirely different type of

compulsion and are adequately answered by the Court below (App. 17a-19a). This is particularly true in light of the fact that this Court in the *Hanson, Street,* and *Allen* cases as discussed above, specifically dealt with constitutional challenges to the requirements of Section 2 Eleventh of the Railway Labor Act and held that the required payment of dues and fees uniformly required of all employees subject to union shop agreements does not violate First Amendment rights under the Federal Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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